committee was necessary. This decision gives rise to a somewhat anomalous situation. A receiver admittedly displaces the directors; yet a liquidating agent, who performs essentially the same duties and is subject to practically the same liabilities, is almost unrecognized. Nevertheless, it is submitted that the decision is both logically correct and expedient. When a corporation is created, authority and control thereof are vested in the hands of the directors. There they should remain until removed pursuant to the authorization of the same sovereign power that imposed them. Such authorization exists in the case of a receiver; it does not exist in the case of a liquidating agent. This ruling conforms to the established principles of the law of corporations and at the same time in no wise impairs the usefulness of such agents, as auxiliary instrumentalities, in the discharge of the duties for which they are appointed.

COSTS AS INDEMNITY FOR LITIGATION.—Although the recovery of costs, as such, by either party was unknown to the common law,[1] yet they were in reality always considered and included in the quantum of damages in such actions where damages were recoverable.[2] Statutes, however, were early passed in England which gave to either the plaintiff or defendant according as the one or the other prevailed in an action, the right to recover costs.[3] Nevertheless it continued to be the practice, after the passing of these acts, for the jury to assess a nominal sum in addition to the actual damages, and for the court then to tax the costs of the parties. This was the origin of costs *de incremento*.[4] While the right of the jury to take into consideration the costs of the litigants is unknown in the United States, the power to award costs is given to the courts under widely prevalent statutes.[5] As, by the common law, the recovery of costs by that name was not recognized until provided by statute, it became the settled doctrine that the allowance of costs depends entirely upon the terms of the statutes of the jurisdiction.[6]

A slight modification of this rule is illustrated in the recent case of *Comstock's Adm'r.* v. *Jacobs* (Vt. 1915) 96 Atl. 4. Under the

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[1]Milliman, Law of Costs, § 2. If the plaintiff failed to recover he was "amerced *pro falso clamore*"; if he recovered judgment the defendant was "*in misericordia*" for his unjust detention of the plaintiff's right. See Day *v.* Woodworth (1851) 54 U. S. 363, 372; State *v.* Board of Commissioners (1897) 14 Ohio Cir. Ct. 26.

[2]3 Bl., Comm., *399; Hullock, Law of Costs, 3; see Kiersted *v.* Rogers (Md. 1824) 6 Harr. & J. 282.

[3]Hullock, Law of Costs, 4; see Lehigh Valley R. R. *v.* McFarland (1882) 44 N. J. L. 674. The statute of Gloucester, 6 Edw. I, c. 1, gave to the plaintiff costs in all cases where he recovered damages. The statute of 23 Hen. VIII, c. 15, together with subsequent acts, gave to a defendant the same costs to which a plaintiff would be entitled had he prevailed. Hullock, Law of Costs 4, 124, *et seq.*

[4]See Kiersted *v.* Rogers, *supra*; Day *v.* Woodworth, *supra*; 6 Vin. Abr. 322. Costs *de incremento* are "the costs adjudged by the judge in civil actions in addition to the damages and nominal costs found by the jury". English Law Dictionary 222.

[5]See for instance Mass. Rev. Stat. 1902, c. 203, § 1 *et seq.*; N. Y. Code Civ. Proc., § 3228 *et seq.*

[6]Peay *v.* Pulaski County (1912) 103 Ark. 601, 148 S. W. 491; Phillips *v.* Corbin (1898) 25 Colo. 567, 56 Pac. 180.

statutes of Vermont no allowance is made for the costs of the transcript of the testimony. But the court held that the costs thereof were taxable, inasmuch as such costs were allowed by English statutes in force at the time when the common law of England was adopted as the law of Vermont. Since it is the established doctrine that most statutes passed in England, in amendment of the common law, before that law was adopted in this country, constitute a part of our common law,[7] this decision is not really in conflict with the theory that it is only by statute that costs are ever allowed, and this seems to have been recognized in some states.[8]

The right to costs in an action does not become vested until judgment is pronounced.[9] But when this right, which has been expressly given by law, has accrued by the rendering of judgment, there is no discretion left in the court of law which must award the costs as directed by statute.[10] In this respect the rights of a litigant to costs in equity differ from those at law, for in an equitable action, costs are allowed, apportioned, or withheld in the sound discretion of the court,[11] although the maximum amount which the court may award is generally regulated by statute.[12] Although costs and fees are essentially different in their nature, the one being an allowance to a party for his expenses incurred in prosecuting or defending a suit; the other a compensation to an officer or witness for services rendered in the progress of the cause,[13] it has become a very general practice to treat fees as costs, and to include them in the execution as if they were a part of the successful party's costs.[14] The failure of the courts

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[7]1 Kent, Comm., *473; State *v.* Rollins (1837) 8 N. H. 550; see Allen *v.* Kane (1914) 79 Wash. 248, 140 Pac. 534.

[8]See Smith *v.* Boynton (1863) 44 N. H. 529; Salem Township *v.* Cook (1889) 6 Pa. Co. Ct. 624.

[9]Pelham *v.* Aldrich (1857) 74 Mass. 515; see Rader *v.* S. E. Road Dist. (1873) 36 N. J. L. 273. A discharge in bankruptcy pending the termination of a suit does not relieve the bankrupt from paying the costs thereof. Dows *v.* Griswold (1877) 122 Mass. 440. Costs are an appendage to the judgment rather than a part of the judgment itself. Shay *v.* Tuolumne Water Co. (1856) 6 Cal. 286.

[10]Sturgis *v.* Spofford (1874) 58 N. Y. 103; Town of St. Charles *v.* O'Mailey (1857) 18 Ill. 407; Crowe *v.* Taylor (1907) 134 Ill. App. 355. In the last case, the defendant in error recovered the costs as fixed by statute for the copy of the transcript, although in fact he paid very much less for the making of the copy.

[11]Blessengane *v.* Boyd (C. C. A. 1910) 178 Fed. 1; Gallatin *v.* Corning Irr. Co. (1912) 163 Cal. 405, 126 Pac. 864; Northern Ill. R. R. *v.* Racine etc. R. R. (1868) 49 Ill. 356. Whether or not costs in equity are dependent on statutes is a matter of dispute. Milliman, Law of Costs, § 4. According to one view they are dependent on the statute of 17 Rich. II, c. 6, see Eastburn *v.* Kirk (N. Y. 1817) 2 Johns Ch. *317, while according to the other view they are allowed by reason of the inherent powers of the court. See Downing *v.* Marshall (1867) 37 N. Y. 380; Struthers *v.* Christal (N. Y. 1870) 3 Daly 327.

[12]See for instance, N. Y. Code Civ. Proc., § 3230.

[13]Tillman *v.* Wood (1877) 58 Ala. 578; Musser Adm'r. *v.* Good (Pa. 1824) 11 Serg. & R. 247.

[14]Veidt *v.* Mo. K. & T. Ry. (1904) 109 Mo. App. 102, 82 S. W. 1122; Peay *v.* Pulaski County, *supra*; see Bohart *v.* Anderson (1909) 24 Okla. 82, 103 Pac. 742.

to regard this distinction has resulted in treating the fees due to officers and witnesses as the debt of the contingent loser of the suit, and not as due immediately from the party for whom the services were rendered. The cost of litigation in this respect has consequently become needlessly expensive, inasmuch as the expense of credit officers or witnesses naturally are more readily incurred by a litigant than that of cash ones.[15]

In this country, however, while in certain instances a court may make extra allowances of costs,[16] the amount of costs recovered is generally so small that it by no means covers the expenses of a suit.[17] Still, although in their origin costs were given as a punishment to a defeated party for causing the litigation,[18] most jurisdictions to-day consider costs, in theory at least, as compensation to a successful litigant for his expenses incurred in the litigation.[19] In England, the costs allowed to a successful litigant are the reasonable costs of the proceeding of such party in an action, including expenses incurred in obtaining the assistance of solicitors and counsel, and the expenses of the various steps in the action up to the signing of judgment.[20] The taxing officer, subject to the court's direction, is also given a very large discretion as to the amount which he may allow.[21] It may therefore be said that costs in England, unlike those in the United States, do in fact amount to a substantial indemnity for the expenses of the suit.

THE WRIT OF PROHIBITION.—The writ of prohibition is a prerogative writ which at first issued only from the Court of King's Bench, but later in some cases from the Chancery, the Court of Common Pleas, or the Court of Exchequer.[1] The injury which it remedied was that of encroachment of jurisdiction, or calling one *coram non judice*. By means of this weapon the common law courts were able to assert their supremacy over the admiralty and ecclesiastical courts,

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[15]See O'Neil *v.* Kansas City etc. R. R. (C. C. 1887) 31 Fed. 663.

[16]See N. Y. Code Civ. Proc., § 3253; Sentenis *v.* Ladew (1893) 140 N. Y. 463, 35 N. E. 650.

[17]Henry Ex'r. *v.* Murphy & Co. (1875) 54 Ala. 246; see Day *v.* Woodworth, *supra*. Costs do not include expenses incurred preparatory to the commencement of an action. Studwell *v.* Cook (1871) 38 Conn. 549. Counsel fees are not generally included in costs. Sedgwick, Damages (9th ed.) § 229; see Jacobson *v.* Poindexter (1883) 42 Ark. 97.

[18]Dibbin *v.* Cook (1735) 2 Str. *1005; see Musser *v.* Good, *supra*. This view still prevails in a few jurisdictions. See Tillman *v.* Wood, *supra*. In Alabama the statute declares that costs are penal. See Lee *v.* Smyley (1849) 16 Ala. 773. Being deemed penal, statutes awarding costs were strictly construed, Dibbin *v.* Cook, *supra*, and this construction is generally followed today. Veidt *v.* Mo. K. & T. Ry., *supra*; State *v.* Baker (1912) 35 Nev. 300, 129 Pac. 452.

[19]Milliman, Law of Costs, § 1; see Stevens *v.* Central Nat. Bank (1901) 168 N. Y. 560, 61 N. E. 904; Sommer *v.* Compton (1909) 53 Ore. 341, 100 Pac. 289.

[20]23 Halsbury Laws of England 184; see Glamorgan County Council *v.* Gt. Western Ry. (1894) 1 Q. B. D. 21.

[21]26 Halsbury Laws of England 797.

[1]3 Bl., Comm., *112.